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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 153

CLARENCE DUKE McGANN, PETITIONER,

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 23, 1959
CERTIORARI GRANTED JUNE 29, 1959

Supreme Court of the United States

OCTOBER TERM, 1959

No. 153

CLARENCE DUKE McGANN, PETITIONER,

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Record from U.S.D.C. for the Eastern District of New York, Brooklyn		
Motion to vacate and set aside judgment of August 8, 1955	1	1
Memorandum, Bruchhausen, J., dated April 8, 1958, denying motion to vacate and set aside judgment	6	5
Affidavit in forma pauperis and application for permission to appeal in forma pauperis	8	6
Notice of appeal	9	8
Order denying leave to appeal in forma pauperis	10	9
Proceedings in U.S.C.A. for the Second Circuit	11	9
Petition for leave to prosecute appeal in forma pauperis and affidavit in support thereof	11	9
Motion for appointment of counsel	13	11
Affidavit of Marie L. McCann	14	12
Petition for leave to prosecute appeal in forma pauperis	18	15
Order dismissing appeal	20	17

	Original	Print
Order denying appellant leave pro se to proceed in forma pauperis	21	18
Motion for rehearing	22	19
Order denying motion for rehearing	25	21
Record from U.S.D.C. for the Eastern District of New York, Brooklyn	26	22
Affidavit in forma pauperis	26	22
Motion to vacate sentence	27	24
Motion for subpoena to produce documents and order denying	36	34
Affidavit of Marie L. McCann	37	35
Memorandum, Bruchhausen, J.	42	40
Proceedings in U.S.C.A. for the Second Circuit	47	43
Petition for leave to prosecute appeal in forma pauperis and affidavit in support thereof	47	43
Exhibit A—Petition for leave to appeal in forma pauperis filed in U.S.D.C. for the Eastern District of New York and order denying	49	45
Affidavit of Marie L. McCann	50	47
Appellant's reply to appellee's motion to dismiss	55	51
Order denying motion for leave to proceed in forma pauperis	58	54
Order granting motion for leave to proceed in forma pauperis and granting petition for writ of certiorari	59	55

[fol. 1] **IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK BROOKLYN NEW YORK**

Criminal 43953

CLARENCE D. MCGANN, APPELLANT-PETITIONER

v.

UNITED STATES OF AMERICA, APPELLEE-RESPONDENT

MOTION TO VACATE AND SET ASIDE JUDGMENT IMPOSED UPON YOUR PETITIONER ON THE 8TH DAY OF AUGUST 1955. BY THE HONORABLE WALTER BRUCHHAVSAN.—filed April 7, 1958

Comes now Clarence Duke McGann, pro se, unlearned in law proceeding in the above styled cause of action herein after known as your petitioner.

Your petitioner now invokes the jurisdiction of this court under Title 28 Section 2255. *"Federal Custody Remedies On Motion Attacking Sentence."*

STATEMENT OF FACTS

Your petitioner presently confined in the U. S. Penitentiary at Leavenworth, Kansas; sentenced by the above court to a period of 12 years imprisonment to run currently with the sentence of 20 years imposed in the District of Maryland.

1. On May 9, 1955 your petitioner appeared before the court and entered a plea of not guilty.

2. On June 6, your petitioner appeared in court for trial, case was postponed.

3. On July 5, your petitioner appeared in court for trial, case was postponed.

4. On July 6, your petitioner appeared in court for [fol. 2] trial, case was postponed.

5. On July 7, your petitioner appeared in court for trial, case was postponed.

6. On July 8, your petitioner appeared before Judge Inch and entered a plea of guilty.

7. On August 8, 1955 your petitioner made a motion to withdraw plea of guilty before sentence was imposed. Motion was denied without a hearing or allowing your petitioner to speak.

Your petitioner sworn and deposes: States that he is innocent of the charge of which he pleaded guilty to. And that said plea was made under duress and undue influence.

COMPENDIOUS ARGUMENT

The rights guaranteed to one accused of a crime fall naturally into two classes:

A. Those which the state as well as the accused is interested; and

B. Those which are personal to the accused, which are in the nature of personal privileges.

Those of the first class cannot be waived. Nor can what is essential to judicial proceedings involving deprivation of life or liberty be dispensed with by the consent of the accused. Hopt -v- Utah, 110, U. S. 574, 579 (1884).

When your petitioner made his motion for a withdrawal of a plea of guilty it became the duty of the court to ascertain the reason for this request from the defendant. (Rule XI Federal Rules of Criminal procedure.) Also Rule 32, Note 46, U. S. -v- Lias, C. C. A. W. Va. 1949, 172 F. (2d) 685.

Under our system, society carries the burden of proving its charge against the accused not out of his mouth. It must establish its case, not by interrogation of the accused, even under judicial safe guards, but by evidence independently secured through skillful investigation.

The law will not suffer a prisoner of his own coviction. (Hawkens Pleas of the crown, C. 46 Sec. 34 (8th Ed. 1824).

(It should be noted that your petitioner never stated that he participated in this crime indictment No. Cr. 43953).

[fol. 3] Your petitioner could cite plaitudes of cases, to do this would only take up the courts time, in further

stating a fact which has already be ascertained, namely that I your petitioner was denied due process of law; that the abuse of the courts discretion in refusing to allow a withdrawal of a plea of guilty is a reversible error.

At this time your petitioner respectfully brings to the attention of the court the case of Michiner -v- U. S., 177 F. (2d) 422 at page 424.

> "The duty of the trial court was to have the defendant produced; have evidence received and hear the testimony and arguments as laid down in Walker -v- Johnson supra. Since U. S. -v- Hayman, supra. Its clear that findings of fact and conclusion of law under section 2255 extend also to cases where the events which are alleged to infringe on the constitutional rights of an accused do not appear upon the face of the record of his conviction. The only way the trial court could make findings of fact was with the defendant present." (See United States-v-Paglia, 190 F. (2d) 445, 2 Cir., 1951 in Support).

Wherefore your petitioner request that this court issue a Writ of Habeas Corpus Ad-Prosequendum Ordering that your petitioner be brought before the court to have a hearing and complete findings of fact and conclusion of law thereto. Regarding his allegations.

Or forthwith outline in writing the reasons for further violation of your petitioner's constitutional rights.

I Clarence Duke McGann, petitioner in case number 43953 being lawfully sworn and under oath desposes and says: That I am a prisoner in custody of the United States, under sentence of this Court; that I believe I have substantial grounds upon which to base these claims for relief, and the foregoing motion states true and accurate facts to the best of my knowledge.

Respectfully Submitted

/s/ Clarence Duke McGann
CLARENCE DUKE MCGANN,
Petitioner

XXXXXX

DATED: APRIL 2 1958.

[fol. 4] IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
BROOKLYN

No. 43953

CLARENCE D. MCGANN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

AFFIDAVIT of FORMA PAUPERIS

STATE of KANSAS)
) ss.
COUNTY of LEAVENWORTH)

CLARENCE DUKE MCGANN, being duly sworn according to law deposes and says that he is the PETITIONER in the above-entitled action; that he is a citizen of the United States, and that because of his poverty he is unable to pay the cost of said action or to give security therefor. He verily believes that he has meritorious cause of action; and should be allowed to proceed into a justifiable conclusion of his cause of action; pursuant to Title 28 U. S. C. A., Section 1915.

CLARENCE DUKE MCGANN,
Petitioner

Sworn to and subscribed before me this 2 day of April, 1958

"Authorized by the Act of July 7, 1955 to administer oaths (18 U.S.C. 4004)."

/s/ L. J. Gengler, Parole Officer
L. J. GENGLER,
Parole Officer

[fol. 5] (File Endorsement Omitted)

[fol. 6] IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. Cr. 43953

UNITED STATES OF AMERICA

- against -

CLARENCE DUKE MCGANN, DEFENDANT

MEMORANDUM—April 8, 1958

The defendant, now in custody, has caused to be filed an application, dated April 2, 1958, to set aside the judgment of conviction, pursuant to 28 U.S.C.A. 2255 and for other relief.

The indictment, in substance, charged that the defendant violated 18 U.S.C. 2111 in that he and a co-defendant on April 21, 1954, at Veterans Administration Hospital, Brooklyn, took a sum of money, amounting to $5,414. He was represented by counsel, assigned by the Court. On July 8, 1955, he pleaded guilty. On August 8, 1955, he was sentenced to imprisonment for a term of 12 years, such sentence to run concurrently with a sentence of twenty years, previously imposed by the United States District Court at Baltimore, Maryland, for the robbery of a bank.

The applicant grounds his present plea upon the bare [fol. 7] statements that he is innocent of the charge and that he pleaded guilty under duress and undue influence. There is no amplification thereof. The record shows that defendant was fully informed and advised of his rights, and had the benefit of counsel, before acceptance of the plea.

The motion is denied.

/s/ Walter Bruchhausen
U. S. D. J.

[fol. 7a] (File Endorsement Omitted)

[fol. 8] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK
BROOKLYN NEW YORK

Case No. 43953

(Title Omitted)

AFFIDAVIT IN FORMA PAUPERIS AND APPLICATION FOR PERMISSION TO APPEAL IN FORMA PAUPERIS—
filed April 17, 1958

I, Clarence Duke Mc Gann being duly sworn says that he is the defendant above named; that he is presently confined in the U. S. Penitentiary at Leavenworth, Kansas pursuant to Judgment and Sentence in this case and is now serving such sentence, that he has fo funds with which to pay the expenses of an appeal herein, that he is a citizen of the United States and makes this affidavit in good faith; that he verily believes he has a meritorious cause of action and is entitled to the redress he seeks by appeal; that by reason of his poverty he is unable to pay the cost of an appeal from the Judgment aforesaid, or to give security therefore.

Wherefore, he prays that this Court direct that the annexed Notice of Appeal be filed without pre-payment of fees or cost and that such expenses involved be paid by the government pursuant to the provisions of Section 1915 Title 28 U. S. C. A.

Respectfully Submitted

/s/ Clarence Duke McGann
CLARENCE DUKE MC GANN,
Petitioner

COUNTY OF LEAVENWORTH
S.S.
STATE OF KANSAS

SUBSCRIBED AND SWORN to be-fore me this day 14 of April, 1958.

"Authorized by the Act of July 7, 1955 to administer oaths (18 U.S.C. 4004)."

/s/ L. J. Gengler
L. J. GENGLER,
Parole Officer

[fol. 8a] (File Endorsement Omitted)

[fol. 9] IN THE UNITED STATES DISTRICT FOR EASTERN DISTRICT, BROOKLYN, NEW YORK

No. 43953

UNITED STATES OF AMERICA, PLAINTIFF

v.

CLARENCE D. MC GANN, DEFENDANT

NOTICE OF APPEAL—April 14, 1958

Name and Address of Appellant: CLARENCE D. MC GANN

Name and Address of Appellant's Attorney: NONE.

Offenses: VIOLATION OF TITLE 18 SECTION 2111 U. S. C. A.

Concise Statement of Judgment or Order: DENIED. (THE WORD DENIED WAS CONCISE).

Name of Institution Where Now Confined: LEAVENWORTH, KANSAS

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the SECOND CIRCUIT From the above-entitled judgment. Your petitioner feels himself aggrived by This Courts refusal to grant a hearing on a Constitutional Question U. S. -v- Hayman, 342 U. S. 205, 209 N. Y.

Dated: .....

.....
Appellant

COUNTY OF LEAVENWORTH)
) ss...
STATE OF KANSAS)

Subscribed and sworn to before me this 14 day of April, 1957.

.....
L. J. Gengler, Parole Officer

[fol. 10] IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NEW YORK, BROOKLYN

Cr-43953

(Title Omitted)

ORDER DENYING LEAVE TO APPEAL IN FORMA PAUPERIS—
April 18, 1958

The defendant applies for leave to appeal in forma pauperis For the reasons stated in the Courts decision, dated April 18, 1958 and upon all of the statements therein made. I hereby certify that the Appeal is not taken in good faith. The application is denied.

WALTER BRUCHHAUSEN
U. S. District Judge.

DATED April 18, 1958

[fol. 11] IN THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT
NEW YORK CITY

CLARENCE DUKE MC GANN, APPELLANT EX PARTE

PETITION FOR LEAVE TO PROSECUTE APPEAL IN FORMA
PAUPERIS AND AFFIDAVIT IN SUPPORT THEREOF—
April 28, 1958

The appellant Clarence D. McGann, being furst duly sworn, on oath deposes and says: That he is a citizen of the United States and the appellant in the above entitled cause; that he is unable to pay the costs of said appeal, or to give security for the same; and that he believes that he is entitled to redress and that such redress is taken in good faith.

Your appellant further states that subsequent to the entry of the judgment in this case, an application, accompanied by an affidavit in conformity with section 1915

Title 28 U. S. C., Code, was on April 17, 1958 made to the trial court to permit appellant to prosecute an appeal therein *in Forma Pauperis,* thereby enabling the trial judge to certify whether or not the appeal was taken in good faith, and that the trial court on the 18th day of April 1958, denied your appellant's application to proceed on appeal without prepayment of fees and costs or to give security therefor, and that the appeal was not taken in good faith.

The nature of the appeal is as follows:

(1) That the plea of guilty entered by the appellant be withdrawn on the grounds that said plea was made under undue influence and being a layman was not familiar with the technicalities of law and that his Constitutional Right by entering a plea of guilty, were violated.

The plea of guilty waives all right, of the appellant. In this case the plea was made against his will.

Wherefore, appellant prays that he be allowed to docket [fol. 12] and proceed with his appeal in this Court without being required to prepay fees or costs, or to give security therefor, and that he be allowed to file an original and four (4) copies of a typewritten brief and appendix thereto in lieu of printing the same.

Respectfully Submitted

/s/ Clarence D. McGann
CLARENCE DUKE MCGANN,
Petitioner

SUBSCRIBED AND SWORN TO before me this 28th day of April, 1958.

/s/ E. A. Cox
Parole Officer

"Authorized by the Act of July 7, 1955 to administer oaths (18 U.S.C. 4004)."

[fol. 13] IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CR 43953

CLARENCE DUKE MCGANN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

MOTION FOR APPOINTMENT OF COUNSEL

Comes now, Clarence Duke McGann, Pro. Se., unlearned in Law proceeding in the above styled cause of action, moving this Court for appointment of counsel to prosecute an appeal from an Order made by the Honorable Walter Bruchausen, United States District Judge for the Eastern District of New York; on the 8th day of April, 1958.

Petitioner gave statutory Notice of Appeal on April 14, 1958 and same was denied. On the 25th day of April, Petitioner appealed to the Court of Appeals for the Second Circuit for Leave to Appeal in Forma Pauperis. On May 2nd, 1958, David F. Jordan, Jr., Law Deputy, informed me that leave to proceed in Forma Pauperis has already been granted to co-defendant, Earl Kill Smith, which gives me the same relief.

Petitioner states that he is unable to encase counsel for this appeal; that he is not skilled or versed in the science of Law and that he verily believes he has a meritorious cause of action.

Wherefore, good cause shown, Petitioner prays that counsel be appointed to prosecute the aforesaid appeal.

Respectfully submitted

/s/ Clarence Duke McGann
Clarence Duke McGann
Petitioner

County of Leavenworth)
) s s
State of Kansas)

Subscribed and sworn to before me this ..... day of ....., 1958.

.....
Parole Officer

[fol. 14] IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Cr. No. 43953

UNITED STATES OF AMERICA

- against -

CLARENCE DUKE McGANN, DEFENDANT

AFFIDAVIT OF MARIE L. McCANN—May 28, 1958

MARIE L. McCANN, being duly sworn, deposes and says that she is an Assistant United Sttaes Attorney, duly appointed according to law and acting as such.

That she represents the United States of America in the prosecution of the above-captioned matter and is fully familiar with the facts thereof.

That this affidavit is submitted in opposition to a motion by the defendant, CLARENCE DUKE McGANN, for leave to appeal in forma pauperis.

That the defendant apparently wishes to appeal a decision rendered by the Honorable Walter Bruchhausen, United States District Judge for the Eastern District of New York denying, in a memorandum opinion, dated April 8, 1958, a petition by the defendant for an "order that sentence imposed upon your petitioner in the Instant Court Cr. 43953 on August 8, 1955 be subjected to any and all reductions which may be given in the sentence that it is to run wholly concurrently with in the District of Maryland, Or suspend the un-executed portion of the sentence, imposed in the instant court."

That the defendant was charged in a one count indictment filed on April 29, 1955 with a violation of Title 18, United States Code, Section 2111, in that on or about April 21, 1954, he and a co-defendant, Earl Kill Smith, did take by force and violence, and by intimidation, the amount of approximately Five Thousand Four Hundred Fourteen Dollars ($5,414.00) in United States currency, from the presence of one Norman Rappaport, at the Veterans Administration Hospital, Brooklyn, New York, within the Eastern District of New York, and the special

[fol. 15] territorial jurisdiction of the United States.

That on May 9, 1955, the defendant was arraigned before the Honorable Walter Bruchhausen who assigned Benjamin Glass, Esq. to represent him, and "after a conference with counsel" McGann entered a plea of not guilty. (Docket Entries)

That on July 8, 1955, after the case had appeared on the calendar several times, the defendant, still represented by counsel, who was present, withdrew his plea of not guilty and entered a plea of guilty to the indictment.

That on August 8, 1955, after his motion to withdraw his guilty plea was denied, the defendant was sentenced to a term of imprisonment for 12 years, to run concurrently with a sentence of 20 years imposed by the Southern District of Maryland.

That defendant urges that the judgment of conviction entered on August 8, 1955 should be set aside for the simple reason "that he is innocent of the charge of which he plead (sic) guilty to. And that said plea was made under duress and undue influence." (Defendant's affidavit page 2, annexed hereto)

That on April 8, 1958, in his memorandum opinion denying defendant's motion to set aside the judgment of conviction, Judge Bruchhausen stated that:

> "The applicant grounds his present plea upon the bare statements that he is innocent of the charge and that he pleaded guilty under duress and undue influence. There is no amplification thereof. The record shows that defendant was fully informed and advised of his rights, and had the benefit of counsel, before the acceptance of the plea."

That on April 18, 1958, defendant's motion for leave to appeal in forma pauperis was denied by Judge Bruchhausen and for the reasons stated in his opinion, he certified that an appeal would not be taken in good faith.

That Title 28, United States Code, Section 1915(a) provide as follows:

[fol. 16] "Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal

therein, without prepayment of fees and costs or security therefor, by a citizen who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith."

That since the defendant alleges no more than that he is innocent of the charge and pleaded guilty under duress, without further details, and since he was represented by counsel at all stages of the proceedings, it is clear that his appeal is without merit.

WHEREFORE, your deponent respectfully requests that defendant's motion for leave to appeal in forma pauperis be in all respects denied.

/s/ Marie L. McCann
MARIE L. McCANN
Assistant U. S. Attorney

Sworn to before me this 28th day of May, 1958.

[fol. 17] • • • •

[fol. 17a] • • • •

[fol. 18] IN THE UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FOLEY SQUARE NEW YORK

CLARENCE DUKE MCGANN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR LEAVE TO PROSECUTE AN APPEAL IN FORMA PAUPERIS

SUPPLEMENTARY BRIEF IN OPPOSITION TO RELIEF PRAYED FOR BY RESPONDENT

OPINION BELOW

The District Court rendered no opinion other than the word denied. Your Petitioner received no other wording.

QUESTIONS PRESENTED

Whether appeal should be taken in good faith.

STATEMENT

On April 2, 1958, Motion to Vacate Sentence pursuant to Section 2255, Title 28, U.S.C. was filed, setting forth various constitutional violations.

A hearing was not held with the presence of your Petitioner. The Honorable Walter Bruchausen on April 8, 1958, denied Motion of Petitioner. On the 14th day of April, 1958, Petitioner filed Notice of Appeal and permission for leave to appeal in Forma Pauperis, same being denied on the 18th day of April 1958. On the 25th day of April, 1958, Petitioner appealed to the Court of Appeals for the Second Circuit for Leave to Appeal in Forma Pauperis.

REASONS FOR GRANTING THE MOTION OF YOUR PETITIONER

In the District Court Petitioner attacked the Judgment through a collateral issue involving constitutional violations. The Petitioner was denied without the Court making a finding of fact as mandated in Section 2255 Title 28, U.S.C.

"Unless the files and records conclusively" show the petitioner is entitled to no relief, the Court shall set the case down for a hearing". Petitioner submits that the files and records do not show conclusively or otherwise any [fol. 19] any reference to the allegations contained in the Motion to Vacate.

Petitioner submits that the evasion of making a finding of fact as mandated in Section 2255, Title 28, U.S.C. and the sunsquent denial of leave to prosecute an Appeal in Forma Pauperis circumvents Due Process of Law through procedural manuvering. Thus a Petitioner in the Penitentiary must be at the mercy and will of Government counsel. Such an existing condition will and does make it impossible for a person once committed and without funds to engage counsel to protect his rights in a Court of the United States.

CONCLUSION

For the afore-mentioned reasons, the Petition for Leave to Prosecute an Appeal in Forma Pauperis should be granted; and this action is taken in good faith and your Petitioner verily believes he is entitled to the redress herein sought.

Respectfully submitted

/s/ Clarence Duke McGann
Clarence Duke McGann
Petitioner

County of Leavenworth)
) s s
State of Kansas)

Subscribed and sworn to before me this _____ day of _____, 1958.

_____
Parole Officer

[fol. 20] IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CLARENCE DUKE MCGANN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ORDER DISMISSING APPEAL ON MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS.

Denied. See *United States* v. *Earl Kill Smith*, 2 Cir., —— F.2d ——, filed July 24, 1958. And it is further ordered that the appeal be dismissed as frivolous.

C.C.H.
S.R.W.
U.S.C.JJ.
S.J.R.
U.S.D.J.

July , 1958

[fol. 21] IN UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

* * * *

Present:

Hon. CARROLL C. HINCKS,
Hon. STERRY R. WATERMAN,
Circuit Judges,
Hon. SYLVESTER J. RYAN,
District Judge.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

CLARENCE DUKE MCGANN, DEFENDANT-APPELLANT

ORDER DENYING APPELLANT LEAVE PRO SE TO PROCEED IN FORMA PAUPERIS—July 31, 1958

A motion having been made herein by the appellant pro se for leave to proceed in forma pauperis,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

Further ordered that the appeal from the order of the United States District Court for the Eastern District of New York be and it hereby is dismissed.

A. DANIEL FUSARO
Clerk

* * * *

[fol. 20a] (File Endorsement Omitted

[fol. 22] IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AT FOLEY SQUARE (7) NEW YORK

CR. NO. 43953

CLARENCE DUKE MCGANN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

MOTION FOR REHEARING—August 28, 1958

The Appellant, Clarence Duke McGann, moves the above named Court for a rehearing of his case #43953 under Rule 60 (b) of the Federal Rules of Civil Procedure.

> "Motion for relief from judgements, orders, etc., obtained against a party through his mistake, inadvertance, suprise or excusable neglect."

Appellant request that he be given a rehearing on his cause; because he was unaware of the decision in full as handed down by the District Court.

The Clerk of the District never forwarded to the Appellant a full copy of the lower Court's decision. If the Appellant had been supplied a copy of the lower Court's decision he could have expounded on the issues made in his first Motion. Appellant was unaware that the lower Court never considered his point of contention "that the refusal of the lower Court to allow the Appellant to withdraw a plea of guilty before imposition of sentence was and is a reversable error."

The Appellant's case, unlike that of Mr. Smith's upon whom the Court based it's decision in Cr. 146-180 of the Southern District, did not request that his plea of guilty be withdrawn. The fact that the Appellant was sentenced to a term of twelve (12) years to run concurrently with a sentence of twenty (20) years in the District Court of Maryland does not make his attempts to clear himself of the later charge frivilious.

The rule in this case which is,

> "The serving of one sentence is not a bar to sentence or prosecution on another."

[fol. 23] The Appellant having the same right and protection of the law as given by the Fourthenth (14) Amendment. "Equal" protection of the law." Wherefore, the serving of one sentence is not a bar to relief on another.

The Appellant was a victim of supprise in not being able to understand the decision of the Courts through neglect of the Clerk of the District Court. Such neglect put the Appellant at predudicial disadvantage in preparing his brief.

Appellant could only contend that he has raised substantial issue of fact, that required a hearing as mandated by Section 2255 of Title 28, U.S.C.

RELIEF PRAYED FOR

Appellanr prays that this Court will grant him a rehearing on his cause and allow him to file a brief bringing forth all his allegations, or in the alternative, remand the case back to the lower Court so that Appellant may expound upon his issues by filing another brief in order that the lower Court may make a finding of fact and conclusion of law thereto.

Respectfully submitted,

/s/ Clarence Duke McGann
CLARENCE DUKE MCGANN
Appellant

County of Leavenworth)
) s s
State of Kansas)

Subscribed and sworn to before me this 28 day of August, 1958.

.....
Parole Officer

[fol. 24] STATEMENT OF FACTS

For the Court's information, I received from your office, the complete decision of the Circuit Court of Appeals, for the Second Circuit, on the 22nd of August, 1958. This fact can be upheld by the records kept at this institution.

/s/ .....
CLARENCE DUKE MCGANN
Appellant

[fol. 25] IN UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

---

* * * *

Present:

Hon. CARROLL C. HINCKS,
Hon. STERRY R. WATERMAN,
Circuit Judges.

Hon. SYLVESTER J. RYAN,
District Judge.

UNITED STATES OF AMERICA, APPELLEE

v.

CLARENCE DUKE MCGANN, APPELLANT

ORDER DENYING MOTION FOR REHEARING—October 3, 1958

A petition for a rehearing having been filed herein by the appellant pro se,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied, without prejudice to another motion in the District Court upon a different and more complete statement of facts.

Clerk

[fol. 26] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK
BROOKLYN, NEW YORK

CR-43953

CLARENCE DUKE MCGANN, PETITIONER-APPELLANT

v.

UNITED STATES OF AMERICA, RESPONDENT-APPELLEE

AFFIDAVIT IN FORMA PAUPERIS—October 16, 1958

Affidavit in Forma Pauperis and Motion for proceedings in the above styled cause.

Comes now Clarence Duke McGann in the above styled cause who states and deposes, to-wit: That he is a citizen of the United States, of sound mind, of legal age and desires action from this Honorable Court pursuant to the sections and statutes of law that pertain to his cause; that he verily believes his actions to be meritorious; that he files in good faith and with the purpose of obtaining justice for his cause.

Further, petitioner prays this Honorable Court grant him leave to file this action in Forma Pauperis due to the petitioner's poverty and because of petitioner's inability to prepay costs of filing of fees thereof and that petitioner has no property and therefore is unable to give security.

Wherefore, petitioner prays this Honorable Court for permission to file and proceed to a justifiable conclusion of his cause in Forma Pauperis.

Respectfully submitted,

/s/ Clarence Duke McGann
CLARENCE DUKE MCGANN,
Petitioner Pro-Se

County of Leavenworth)
State of Kansas) SS

Subscribed and sworn to before me this 16th day of October, 1958.

/s/ A. W. Peters
Parole Officer

"Authorized by the Act of July 7, 1955 to administer oaths (18 U.S.C. 4004)."

[fol. 27] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, BROOKLYN, NEW YORK

(Title Omitted)

MOTION TO VACATE SENTENCE—filed October 20, 1958

JURISDICTIONAL STATEMENT

Comes now the Clarence Duke McGann herein after known as the Appellant. Now invokes the Jurisdiction of this Court under Title 28, Section 2255, U. S. C. which gives said Court the power and authority to Vacate and Set Aside a sentence of conviction, where there is a violation of a prisoner's constitutional rights, with said illegal conviction creating evidence to substantiate a collateral attack, where there is a Constitutional question invoked.

STATEMENT OF FACTS

The Appellant is presently confined in the United States Penitentiary at Leavenworth, Kansas, serving a sentence imposed in this District Court in the above numbered case; for alleged violation of Title 18, Section 2111, Robbery on the Special Maritime and Territorial Jurisdiction of the United States.

QUESTION PRESENTED

Is the Appellant entitled to a fair and impartial trial?

Was the refusal of the District Court to allow the Appellant to withdraw his plea before imposition of sentence, without making a finding of fact, an abuse of judicial discretion and a reversable error?

The Appellant says that he was entitled to a fair and impartial trial. He further says that the refusal of the District Court to allow the Appellant to withdraw his plea of guilty before imposition of sentence, without making a finding of fact, is an abuse of judicial discretion and a reversable error.

[fol. 28] STATEMENT OF THE CASE

As the Appellant desires that this Court understands the manner in which the Appellant was denied his Constitutional rights, he thinks it necessary to show to the Court the *collusion* between the U. S. Attorney's of the Southern and Eastern Districts of New York in Cr. Nos. 146-180 and 43953, respectively.

On April 26, 1955, the U. S. District Court for the Southern District (Cr. 146-180) issued a *Writ of Habeas Corpus Ad Prosequendum* for the Appellant.

On the 4th of May, 1955, the Appellant was brought before the Honorable Justice Leibell of S. D. without attorney; Appellant pleaded "not guilty". The Court could not make appointment of Attorney at the time. The Justice stated that I be brought back to Court next week to make appointment of Counsel.

On the 9th of May, 1955, the Appellant was taken before the District Court in the Eastern District. Appellant plead "not guilty" to the charge of Armed Robbery on the Maritime an Territorial Jurisdiction of the U. S. Benjamin Glass was appointed as Attorney for the Appellant and Co-defendant, Earl K. Smith, whom pleaded "guilty". Case adjourned until 6 June, 1958.

On May 10th, 1955, Appellant was brought before the District Court, Southern District. Appellant was appointed one Samual B. Altman as Attorney. Appellant entered a plea of "not guilty" to the charge of Bank Robbery. Trial was set for the 20th of June, 1955.

On May 17, 1955, Appellant was taken from the Federal House of Detention and placed in the City Prison at 125 White Street.

During this period the Appellant was question by the F. B. I. Appellant maintained his innocence.

On May 18, 1955, Appellant filed a Motion and mailed it from the City Prison. Said Motion was returned by the Clerk of the District Court as there was not an affidavit of Forma Pauperis attached. Said Motion was held in the prison one week by City Officials. On June 5, Appellant filed another Motion requesting that he be returned to the Federal House of Detention at West Street as he was a Federal Prisoner and was serving a

Federal sentence. Appellant further stated in his motion that he was being *subjected to Duress in order to get him to change his plea of Not Guilty.* Motion was set for hearing on the same day as the trial.

On June 6, 1955, Appellant was taken to the Eastern District before Chief Justice "Inch". Appellant main-[fol. 29] tained his plea of "not guilty". Case was adjourned until July 5th, 1955.

On June 20, 1955, Appellant was returned to the Sothern District. The U. S. Attorney George S. Leisure, made a statement to the effect "that my Court appointed attorney told him that he didn't feel it his duty to argue my motion". He was only appointed to argue the case itself. The Appellant then argued his own motion unseccessfully. The trial was again postponed until the 27th of June, 1955.

"The Appellant wishes the Court to note that during all these appearences in the Southern and Eastern District, the Government nor my Court appointed attorney made any move to form a Jury."

On June 27, 1955, Appellant appeared in the Southern District. As the Appellant was entering the Court the U. S. Attorney, Mr. Leisure, was asking the Court for a postponement. When the Appellant came to a stop at his position in the Court, the Appellants Court appointed Attorney, S. D. Altman, had seconded the request of the Government, and the Appellant was being removed from the Court Room, having been in Court, the exceedingly long time of 30 seconds.

Approximitely 30 minutes more or less after, I was taken from the Court Room. My Court appointed lawyer, Mr. S. B. Altman, came down to talk to me. He told me why not play ball with the U. S. Attorney. He only wanted the win on his record as it was a Bank Robbery case and that the Government would ask for a suspended sentence or a very light sentence as not to interfere with my chances of release in the Maryland case. They would also have me transferred back to the Federal House of Detention where living conditions where better. (For in a city jail, without money, you cannot even get toothpaste, and some 25 men shave with the same razor blade. Change of clothing is unheard of.) I told my lawyer

that I would go along with the Court on those grounds as long as the sentence didn't interfere with my chances of release on the Maryland sentence.

I was returned to the Southern District on the 28th of June, 1955, at which time I withdrew my plea of "not guilty" and entered a plea of "guilty".

Upon leaving the Court Room, Mr. Leisure, U. S. Attorney, came downstairs to talk to me. He confirmed the promises made to me by my court appointed attorney. He even went a step further and requested that I change my plea in the Eastern District.

I told him that if the Attorney in the Eastern District [fol. 30] would make me the same agreement, and ask that no sentence be imposed, or if one was imposed it wouldn't interfer with my chances of release in the Maryland case, which would mean a sentence not exceeding five years.

Mr. Leisure, than called the U. S. Attorney in the Eastern District, Miss Marie McCann. He told Miss McCann to come and see me at the City Prison at 125 White Street and see what kind of agreement we could make. Mr. Leisure then told me he called her and she would come to see me tomorrow, the 29th of June.

On the 29th of June, 1955, Miss Marie McCann, along with another U. S. Attorney came to visit me at the City Prison during the lunch period.

A number of the guards and Co-officer's of my brother whom was a correction officer at the time, recongized Miss McCann from her recent T. V. appearence on the Show entitled "What's My Line".

Miss McCann made the same agreement with me as the U. S. Atty. Mr. Leisure, in agreeing to ask that a suspended sentence be given, or if sentence was imposed that a light sentence be imposed so as not to interfer with my chances in the Maryland Case. Miss McCann than asked me what was my contentions in the Maryland Case. I explained to her that I was sentenced twice for the same crime. One sentence was for five years and another for twenty years on two different indictments. (See indictments 23017 and 23024, U. S. District Court, for the District of Maryland-Baltimore).

I was brought back to the Eastern District a total of four time after the 6th of June before I changed my plea

to guilty. The reason for the delay was that I was waiting for the U. S. Atty. to have me returned to the Federal House of Detention at West Street. I entered my plea of Guilty on the 8th of July, 1955.

A few days later the F. B. I. called me down to the Court House and asked me to sign a confession and tell them about the crimes. I told them that I made a deal and now it was up to the Government to keep up their end of it. I would not sign any statement, nor would I admit that I took part or knew anything about the crimes alleged.

On August 3, I was brought before the Hon. Judge Ryan for sentence. Instead of the U. S. Atty. asking that no sentence be imposed, he tried to get me more time, (See Motion filed in opposition to Motion for Correction of sentence, Mark F. Hughes, Asst. U. S. att. 17 Sept. 57, U. S. D. C. 148-180 Southern District). He tried to get for Foster and Smith suspended sentences or light [fol. 31] sentences; even after sentence he try to keep them in New York in order to reduce the sentence.

On th 8th of August, 1955, I was returned to the District of Court of the Eastern District. Whereupon, the Appellant entered a Motion for a withdrawal of a plea of guilty. The Court denied the Motion without making a finding of fact or conclusion of law, thereto.

On the 10th of August, the Appellant filed a Motion to Vacate and Set Aside the sentence on the grounds of undue duress and hardship, etc. Said Motion being filed in the District Court for the Southern District. The Clerk of the Court received my Motion as a "Motion for Reduction of Sentence" although my motion was not so entitled. Some time later I found out that my motion was denied on all points. I did not receive any moving or answering papers nor was I present at the hearing.

On December 15, 1955, under Rule 32, Federal Rules of Criminal Procedure, Motion to withdraw plea of Guilty denied. Honorable Thomas F. Murphy, Judge, Case no. 146-180, Southern District.

On January 30, 1956, under Title 28, Section 2255, motion denied without a hearing. Honorable John W. Clancy, Judge. Case no. 146-180.

The Appellant appealed to the U. S. Court of Appeals

for the Second Circuit on March 13, 1956. Appeal was granted on 21 March, 1956.

On April 23, 1956, the Appellant moved the Court of Appeals for an order which would appoint him counsel and grant him permission to appeal in Forma Pauperis. The Government cross-moved on April 25, 1956, for dismissal of the Appeal on the ground that Appellant's notice of appeal was untimely. On May 7, 1956, the Court of Appeals dismissed the appeal, holding that Rule 37(a), Rules of Criminal Procedure had foiled the appeal.

The Appellant then sucessfully appealed to the Supreme Court, which entered the following order on November 13, 1956, Misc. No. 204.

> "Per Curiam the Motion for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The order is vacated and the cause remanded to the Court of Appeals for consideration on the merits. United States v. Hayman, 342 U. S. 205, 209 N. H. 352 U.S. 904.

On the 15th of January, 1957, the Appellant filed a second brief in the Court of Appeals requiring that his cause be remanded to the District Court for a hearing as mandated by Hayman v. U. S. Supra.

[fol. 32] The Court of Appeals held that because the Appellant could not claim the right to be released from confinement, which allegation or claim is a jurisdictional prerequesite of such a Motion and further suggested that the Appellant file a Motion for correction of sentence, which Appellant did.

The Appellant then proceeded to again attack the sentence imposed in the U. S. District Court of Maryland. During the Appellants studies at the Law library at the institution, the Appellant became aware of the fact that the position taken by the Court of Appeals in the Second Circuit 240f f(2d) 670, was incompiete contrast with the 14th amendment. Whereupon the Appellant filed his motion in Cr. 43953 of the Eastern District of N. Y. under Title 28, Section 2255, charging that his plea of guilty was made under undue influence and duress further stating that his Motion to withdraw a plea of guilty before imposition of a sentence, having been denied with-

out cause or finding of fact is a reversable error, citing case. Dated 2nd, April, 1958.

The Motion was denied without appellant being sent a copy of the decision as handed down by the Court.

On the 28th of April, Appellant filed a notice of appeal in Forma Pauperis. The same being denied without the Appellant getting a certified copy of the order. Appellant was sent a sheet of paper without regular Court heading, and without being signed by any employee of the Government or office of the clerk. The order stated that the appeal was not taken in good faith. Appellant appealed to the United States Court of Appeals for the Second Circuit.

The Appellant argued his motion on the grounds that he raised substational issues of facts that required a hearing as mandated by Title 28, Section 2255, and interpreted by the Supreme Court in Hayman vs. U. S. Supra. It then came to the attention of the Appellant that the District Court gave more than a one word decision in denying his motion of April 2, 1958.

The Court of Appeals denied the Appellants motion for leave to appeal in forma pauperis. "Denied. See U. S. v. Earl Kill Smith, 2 Cir. F.2d, filed July 24, 1958, and it is further ordered that the appeal be dismissed as Frivolous."

C.C. H.
S. R. W.
U. S. C. J. J.
S. J. R.
U. S. D. J.

[fol. 33] On the 28th day of August, 1958, Appellant filed a Motion for rehearing on the grounds that he was at a prejudicial disadvantage, due to the neglect of the Clerk of the Court to inform the Appellant of the decision in full as rendered by the Court.

The Court of Appeals denied Motion for a rehearing without prejudice to another Motion in the District Court upon a different and more complete statement of facts.

Following upon the order as rendered by the Court of Appeals, the Appellant now files his second brief in this cause.

COMPEDIOUS AGRUEMENT

The Constitutional guaranty of equal protection of Law to people of the Commonwealth, implies that all litigants similarly situated may appeal to Courts for both relief and defense under like conditions, with like protection and without discrimination. This principle was clearly outlined in the Supreme Court decision of the now famous Palko v. State of Connecticut 302 U. S. 319, 58, S. Ct. 149, 82 L. Ed.

The Appellant at the time sentence was imposed in Cr. Nos. 146-180, Southern District, and 43953, Eastern District of New York was serving a sentence imposed in the District Court for the District of Maryland.

The government proceeding under the rule *"that the serving of one sentence is not a bar to prosecution on another."* Under the rights giving the Appellant by the 14th Amendment namely, equal protection of the law, the Appellant seeks relief upon the sentences imposed in the Eastern and Southern District of N. Y. under the rule *"that the serving of one sentence is not a bar to relief on another.* To hold otherwise would be to nullify the 14th Amendment.

On June 29, 1955, the Appellant was visited at the City prison, 125 White Street, by Miss Marie McCann and another U. S. Attorney. There was no other persons present other than the two U. S. Attys. and myself, my court appointed atty. was not present. Nor had I, the Appellant entered a plea of guilty. The purpose of the visit was to induce the Appellant to plead guilty. Miss McCann promised the Appellant that if he pleaded guilty, she would request that no sentence be imposed, and if one was imposed it would be a light sentence so as not to interfer with my chances of release on the Maryland sentence, of which she knew that I was going to attack upon grounds of double jeopardy.

[fol. 34] On the 8th of July, 1955, Appellant entered his plea of guilty, on August 3, 1955, Appellant realized that he had been tricked, as the Government Attorney in the Southern District of New York had not kept his promise and tried to get the Appellant more time. Therefore, on the 8th of August, 1955, the Appellant made a Motion to withdraw his plea of guilty before imposition

of sentence in Cr. 43953 in the Eastern District. Withdrawal of a plea of guilty will be permitted if it clearly appears that plea was entered by defendant as a result of fear, coercion, or mistakes. The denieal of the Court to allow withdrawal of a plea of guilty is a reversable error. It is necessary that the accused show in support of his motion that the plea of guilty should not be allowed to stand against him because of some reason existing when it was entered, but for which he would not have entered the plea, and that reason must amount to a fraud or an imposition upon him or a misapprehension of his legal rights. (Bergen vs. U.S. 145 F 2d 181) (Townsend v. Burke, 334 U. S. 736, 738, 68 S. Ct. 1252, 1254)

The District Court did not allow the Appellant to withdraw his plea of guilty; nor did the District Court allow the Appellant to give reasons for his motion for withdrawal of his plea of guilty, but denied his motion without any finding fact or conclusion of law thereto, which is a reversable error.

The Appellant has shown that the Government through the extra judicial procedure of its Attorney which amounts to a violation if the Appellants Constitutional rights INDUCED HIM TO PLEAD GUILTY TO TWO CRIMES OF WHICH HE IS INNOCENCE.

A check with the F. B. I. will show that the Appellant never signed nor made a statement admitting any knowledge of the crimes alleged.

It should seem that when charges raises a substantial issue of fact, in these circumstances, that the Appellee should welcome a hearing to silence the charges that the Appellant has been the victim of a tinted conviction.

But to the contrary, the Appellee has used its superior legal knowledge to keep the Appellant from having a hearing in open Court.

ISSUANCE OF SHOW CAUSE ORDER

Comes now the Appellant-Petitioner, Clarence Duke McGann, and moves the Honorable Court to issue an order commanding the United States of America, who is the Respondent, by it's Government Counsel to show [fol. 35] legal and just cause under oath as prescribed

under Rule 12 of the rules of Civil Procedure within twenty (20) days as to why the convictions under CR. 43953 should not be vacated and release the Appellant-Petitioner from the custody of said Respondent.

CONCLUSION

Your Petitioner, Clarence Duke McGann, certifies that he is submitting this Motion in good faith, he verily believes the matters and things contained therein, are meritorious and well founded in fact and law.

Respectfully submitted,

/s/ Clarence Duke McGann
Clarence Duke McGann

County of Leavenworth)
) SS
State of Kansas)

Subscribed and sworn to before me this 16th day of October, 1958.

/s/ A. W. Peters
Parole Officer

"Authorized by the Act of July 7, 1955 to administer oaths (18 U.S.C. 4004)."

[fol. 35a] (File Endorsement Omitted)

[fol. 36] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, BROOKLYN, NEW YORK

Cr. 43953

CLARENCE DUKE MCGANN, PETITIONER-APPELLANT

v.

UNITED STATES OF AMERICA, RESPONDENT-APPELLEE

To: The Honorable Walter Bruchhausen, United States District Judge.

MOTION FOR SUBPOENA TO PRODUCE DOCUMENTS—filed October 20, 1958

The Appellant request that the below named Official of the Department of Corrections of the City of New York, namely, Mr. Hugh L. Tunney, Secretary of the Board of Corrections be subpoena to produce the records of all visits as made to the Appellant by Agents of the Government, namely, U. S. Attorneys whom visited the Appellant at the City prison at 125 White Street in New York City, on the 29th of June, 1955. The Appellant states that these documents will sustain the extra judicial efforts as made by the Government in order to deny the Appellant of his Constitutional rights.

Wherefore the Appellant prays that this Court will issue a subpoena to the above named Official to produce the documents requested. This request is made in connection with a Motion to Vacate Sentence.

Respectfully submitted,

/s/ Clarence Duke McGann
Clarence Duke McGann

County of Leavenworth)
) SS
State of Kansas)

Subscribed and sworn to before me this 16th day of October, 1958.

/s/ A. W. Peters
Parole Officer

"Authorized by the Act of July 7, 1955 to administer oaths (18 U.S.C. 4004)."

Order Denying Motion—October 20, 1958

There is no legal authority for the issuance of a subpoena under these circumstances. Hence the application is denied.

/s/ Walter Bruchhausen
U. S. D. J.

Dated October 20, 1958.

[fol. 36a] (File Endorsement Omitted)

[fol. 37] IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

United States of America

- against -

Clarence Duke McGann, defendant

Affidavit of Marie L. McCann—filed November 12, 1958

State of New York)
) ss
County of Kings)

Marie L. McCann, being duly sworn, deposes and says that she is an Assistant United States Attorney for the Eastern District of New York, duly appointed according to law and acting as such.

That she represented the United States of America in the prosecution of the above-captioned matter, and is fully familiar with the facts therein.

That this affidavit is submitted in opposition to defendant's motion to vacate and set aside a judgment of conviction entered against him on August 8, 1955.

That the defendant was charged in a one count indictment filed on April 29, 1955 with a violation of Title 18, United States Code, Section 2111, in that on or about April 21, 1954, he and a co-defendant, Earl Kill Smith, did take by force and violence, and by intimidation, the amount of approximately Five Thousand Four Hundred Fourteen Dollars ($5,414.00) in United States currency from the presence of one Norman Rappaport, at the Veterans Administration Hospital, Brooklyn, New York, within the Eastern District of New York, and the special territorial jurisdiction of the United States.

That on May, 9, 1955, the defendant was arraigned before the Honorable Walter Bruchhausen who assigned Benjamin Glass, Esq. to represent him, and "after a conference with counsel" McGann entered a plea of not guilty. (Docket Entries)

That on July 8, 1955, after the case had appeared on the calendar several times, the defendant, still represented by counsel, who was present, withdrew his plea of not guilty and entered a plea of guilty to the indictment.

[fol. 38] That on August 8, 1955, after a motion to withdraw his guilty plea was denied, the defendant was sentenced to a term of imprisonment for 12 years, to run concurrently with a sentence of 20 years imposed by the United States District Court for the District of Maryland.

That in a motion filed on April 7, 1958, defendant petitioned for an "order that sentence imposed upon your petitioner in the Instant Court Cr. 43953 on August 8, 1955 be subjected to any and all reductions which may be given in the sentence that it is to run wholly concurrently with in the District of Maryland, Or suspend the un-executed portion of the sentence, imposed in the instant court."

That the basis of that motion was that defendant was "innocent of the charge of which he plead (sic) guilty to.

And that said plea was made under duress and undue influence." (Defendant's affidavit, page 2)

That on April 8, 1958, in a memorandum opinion denying defendant's motion to set aside the judgment of conviction, Judge Bruchhausen stated that

> "The applicant grounds his present plea upon the bare statements that he is innocent of the charge and that he pleaded guilty under duress and undue influence. There is no amplification thereof. The record shows that defendant was fully informed and advised of his rights, and had the benefit of counsel, before the acceptance of the plea."

That on April 18, 1958, defendant's motion for leave to appeal in forma pauperis was denied by Judge Bruchhausen and for the reasons stated in his opinion, he certified that an appeal would not be taken in good faith.

That the United States Court of Appeals for the Second Circuit, denied defendant's motion for leave to appeal in forma pauperis, stating:

> "Denied. See *United States* v. *Earl Kill Smith*, 2 Cir., —— F.2d ——, filed July 24, 1958. And it is further ordered that the appeal be dismissed as frivolous."

That the basis of defendant's present motion is apparently confined to alleged promises of a suspended sentence on a plea of guilty made to him by your deponent and by George S. Leisure, Jr., formerly an Assistant United States Attorney for the Southern District [fol. 39] of New York, now engaged in the private practice of law.

That as is apparent from defendant's moving papers, defendant is a persistant movant who has already litigated the question of promises allegedly made to him by Mr. Leisure in motions brought in the United States District Court for the Southern District of New York, and having failed in his efforts in that District, is now apparently seeking to relitigate the same issues in the Eastern District of New York.

That in defendant's moving papers filed in the Southern District of New York, he also accused deponent of making him promises in order to induce a plea of guilty.

That your deponent, together with Assistant United States Attorney Kenneth C. Sternberg, did visit defendant while he was confined in the New York City Prison, at defendant's request.

That your deponent has no present recollection of the manner in which that request was relayed to her, however, she categorically denies that at any time she made any promises of a suspended sentence to the defendant, nor did Mr. Sternberg make any such promises at the time he accompanied her on her visit to defendant.

That at no time did your deponent indicate to Mr. Leisure that the defendant might get a suspended sentence on the charge pending against him in the Eastern District of New York.

That your deponent has discussed the present motion with Mr. Leisure who has stated his willingness to submit an affidavit to the effect that at no time did he promise the defendant a suspended sentence in connection with the matter pending in this court.

That in *United States* v. *Earl Kill Smith*, 257 F.2d 432 (2d Cir. 1958), the Court of Appeals for the Second Circuit, in connection with McGann's co-defendant, stated:

> "His admissions made on such solemn occasions as arraignment and sentence in open court in the presence of his counsel and the judge are more trustworthy than the assertion now made by motion two years later in Alcatraz, at least in the absence of credible and independent evidence showing some infirmity in the plea." (p. 434)

[fol. 40] That with respect to the allegations against Mr. Leisure, the words of the Court of Appeals in the *Smith* case seem particularly pertinent:

> "'If he chose to rely upon representations of those who had no power to commit the prosecutor, he took the same chances that anyone does who does not ascertain whether his promisor has the power to speak for another.'" (p. 434)

That assuming that Mr. Leisure had made any such promises to defendant in connection with the Eastern

District case, it is clear that he would have had no power whatsoever over the sentence which this court saw fit to impose, and moreover, that there would have been no reason for defendant to believe that he did have such power.

That in *United States* v. *McGann*, 245 F.2d 670 (2d Cir. 1957), the Court stated at page 672:

> ". . . Section 2255 is available only to a prisoner claiming the right to immediate release if the issues are determined in his favor. Since appellant cannot claim to be released because of any infirmities in the sentence in the Southern District of New York so long as he is lawfully in custody under the uncompleted sentence imposed in the District of Maryland, the validity of which remains unchallenged, his application under Section 2255 is premature."

WHEREFORE, your deponent respectfully requests that defendant's motion be in all respects denied.

/s/ Marie L. McCann
MARIE L. McCANN

Sworn to before me this 12th day of November, 1958

/s/ Henry Bramwell
HENRY BRAMWELL

Notary Public, State of New York, Qualified in Kings County, No. 24 - 0390450, Commission Expires March 30, 1959

[fol. 41] AFFIDAVIT OF MAILING
(Omitted in Printing)

[fol. 41a] (File Endorsement Omitted)

[fol. 42] IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Cr. No. 43953

UNITED STATES OF AMERICA

against

CLARENCE DUKE McGAHEE, DEFENDANT

MEMORANDUM—November 18, 1958

The defendant, now in custody, moves to vacate the judgment of conviction herein upon the ground that he was induced by an Assistant United States Attorney to plead guilty upon a promise to ask the court for a light sentence, that the promise was not kept, that he then sought to withdraw the plea and was refused.

The defendant was indicted for three offenses committed within a six month period in 1954, i.e., for a robbery by force and violence in this district, a robbery in the Southern District of New York and a robbery in the District of Maryland.

In September 1954, he was sentenced by the said Maryland Court to imprisonment for a term of twenty years. On or about August 3, 1955, he pleaded guilty to the charge in the said Southern District Court and was sen-
[fol. 43] tenced to a term of imprisonment. On August 8, 1955, after pleading guilty in this court to the charge therein pending, he was sentenced to imprisonment for a term of twelve years to run concurrently with the twenty year sentence in Maryland.

The motion papers are voluminous. The defendant charges acts of omissions or non-feasance allegedly committed by responsible officers of the United States Attorneys in the Southern and Eastern Districts, individually and in conspiracy, and by the attorney assigned to him, and also claims that he was the victim of double jeopardy in the Maryland Court. The substance of these allegations has been previously passed upon by the defendant by means of various motions and applications and on appeal.

The defendant's main objective is to upset the Maryland conviction. He seems convinced that suspended or light sentences on the convictions in the Southern and Eastern Districts of New York will strengthen his position in Maryland.

He also contends that the said Assistant United States Attorneys conspired to induce him to plead guilty to the charges in the said districts of New York by assuring him that they would request suspended or light sentences and that upon non performance he endeavored to withdraw those pleas but without success.

THE DEFENDANT'S VERSION OF THE EVENTS LEADING UP TO HIS ADMISSION OF GUILT IN THIS COURT

[fol. 44] On May 9, 1955, the defendant was arraigned on an indictment charging that he and a co-defendant, Earl Kill Smith, on April 21, 1954, at the Veterans Administration Hospital did take by force and violence the sum of $9414 in currency. He pleaded not guilty. Mr. Benjamin Glass, an attorney, was assigned to represent him.

The defendant asserts that on June 20, 1956, an Assistant United States Attorney of this district agreed that if he pleaded guilty the said official would ask for a suspended or light sentence so as not to interfere with his chances in the Maryland case.

On July 3, 1956, while still represented by assigned counsel, he appeared in this court, withdrew his plea of not guilty and entered a plea of guilty. The record shows that he took this step of his own volition and that he was then informed that the court had the power to and might sentence him to imprisonment, without mention of its extent.

On August 15, 1956, while still represented by assigned counsel, the defendant was brought into court. Having discovered shortly prior thereto that the Assistant United States Attorney in the Southern District Court failed to request a light sentence, he decided to and did request this court to permit him to withdraw his plea of guilty which was denied.

THE SUBSTANCE OF THE DEFENDANT'S PLEA FOR RELIEF INSOFAR AS THE PROCEEDINGS IN THIS COUET ARE CONCERNED

[fol. 45] The defendant, in essence, claims that the failure of the Assistant United States Attorney to request a light sentence, pursuant to agreement to do so, entitled him to withdraw his plea of guilty entered upon such assurance.

THE ANALYSIS OF THE DEFENDANT'S CLAIM

The sentences in the Southern and Eastern District Courts would have no effect whatever upon the Maryland Court in determining the issue of double jeopardy. It is settled law that such an issue must be adjudicated upon the record in the court where it is raised, unaffected by occurrences elsewhere.

Assuming, without conceding, that either or both of the Assistants in the offices of the District Attorneys agreed with the defendant to plead for lighter sentences and didn't do so, such omissions could not and did not impinge upon his legal rights or alter his status in that the court, in fixing punishment, gave him full credit for the plea of guilty and the consequent avoidance of a trial. The added supplications of the defendant's adherents could add nothing toward a proper and just determination of the sentence. The Court, fully aware and cognizant of that consideration as well as all other factors remained the sole arbiter of the sentence and exercised its function, as prescribed by law. See also United States [fol. 46] v. Earl Kilb Smith, 2 Cir., 257 F.2d 462.

The motion is denied.

/s/ Walter Bruchhausen
U. S. D. J.

[fol. 46a] (File Endorsement Omitted)

[fol. 47] IN THE UNTED STATES COURT OF APPEALS, SECOND CIRCUIT

CLARENCE D. McGANN, APPELLANT, EX PARTE

PETITION FOR LEAVE TO PROSECUTE APPEAL IN FORMA PAUPERIS AND AFFIDAVIT IN SUPPORT THEREOF — December 10, 1958

The Appellant, CLARENCE D. McGANN, being first duly sworn, on oath deposes and says; that he is a citizen of the United States and the Appellant in the above entitled cause; that he is unable to pay the costs of said appeal or to give security for the same; and that he believes that he is entitled to the redress he seeks and that such redress is taken in good faith.

Your Appellant further states that subsequent to the entry of the judgment in this case, an application, accompanied by an affidavit in conformity with Section 1915, Title 28, U. S. C. Code was on December 10th, 1958 made to the Trial Court to permit Appellant to prosecute an appeal therein in Forma Pauperis, thereby enabling the Trial Judge to certify whether or not the appeal was taken in good faith, and that the Trial Court on the 24th day of December 1958, denied your Appellants application to proceed on appeal without prepayment of fees and costs or to give security thereof.

The District Court did not certify that the appeal was not taken in good faith. The word denied was consise. The orginal application to perfect an appeal to this Court and the order of the Court is attached to this petition as exhibit "A".

THE NATURE OF THE APPEAL IS AS FOLLOWS:

The Appellant contends that he was induced by the Government, to enter a plea of guilty the Appellant being a layman and not feamiliar with the technicalities of law, entered a plea of guilty. Prior to imposition of sentence the Appellant made a motion to withdraw his plea of guilty. The Court denied this motion without making a finding of fact, as to why it was made.

[fol. 48] The Appellant believes that the refusal of the District Court to allow the Appellant to withdraw a plea

of guilty without making a finding of fact is an abuse of judicial discretion and a reverseable error!

This point was argued in the District Court by the Appellant; but the Honorable Walter Bruchhausen, did not rule on the point of law as contended by the Appellant. It completely ignored it, as though it was never mentioned.

Although the Government Agents admitted that they committed extra judicial proceeding with the Appellant; prior to his entry of a plea of guilty.

Wherefore, Appellant prays that he be allowed to docket and proceed with his appeal in this Court without being required to prepay fees or costs, or to give security therefor, and that he be allowed to file an original and four (4) copies of a type written brief and appendix thereto in liev of printing the same.

Respectfully Submitted,

/s/ Clarence D. McGann
Clarence D. McGann

Leavenworth County)
) ss
State of Kansas)

Subscribed and sworn to before me this 10th day of December, 1968.

/s/ A. W. Peters
Parole Officer

Application Denied:

Walter Bruckhausen,
U.S.D.J.

Dec. 14, 1968

[fol. 49] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

Cr. 43953

CLARENCE DUKE MCGANN, APPELLANT-PETITIONER

v.

UNITED STATES OF AMERICA, APPELLEE-RESPONDENT

EXHIBIT A TO PETITION

NOTICE IS HEREBY GIVEN THAT CLARENCE DUKE MCGANN ABOVE NAMED, HEREBY APPEALS TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, FROM THE ORDER ENTERED IN THIS ACTION ON THE 18TH DAY OF NOVEMBER 1958 BY THE HONORABLE WALTER BRUCHHAUSEN.

The Appellant feels himself aggrieved by this Court's decision; Appellant feels that he has a meritorious cause of action and that he is entitled to the redress he seeks by appeal.

The nature of the Appeal is as follows:

(1) Is the Appellant entitled to a fair and impartial trial?

(2) Was the refusal of the District Court to allow the Appellant to withdraw his plea before imposition of sentence, without making a finding of fact, an abuse of judicial discretion and a reverseable error?

Wherefcre the petitioner prays that this Court will allow him to file this appeal without prepayment of filing fees or cost, pursuant to Title 28, Section 1915, as the petitioner is a pauper and a citizen of the United States and is unable to prepay costs of filing fees thereof.

Respectfully submitted,

/s/ Clarence D. McGann,
Clarence D. McGann,
Appellant-Petitioner

State of Kansas)
) ss
County of Leavenworth)

Subscribed and sworn to before me this 10th day of December, 1958.

/s/ A. W. Peters
Parole Officer

APPLICATION DENIED:

True Copy of Order
Dec. 14, 1958

Walter Bruchhausen,
U.S.D.J.

[fol. 49a] (File Endorsement Omitted)

[fol. 50] IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Cr. No. 43953

UNITED STATES OF AMERICA

- against -

CLARENCE DUKE MCGANN, DEFENDANT

AFFIDAVIT OF MARIE L. MCCANN—February 10, 1959

MARIE L. MCCANN, being duly sworn, deposes and says that she is an Assistant United States Attorney for the Eastern District, New York, duly appointed according to law and acting as such.

That she represents the United States of America in connection with the above captioned matter and is fully familiar with the facts therein.

That this affidavit is made in opposition to a motion by the defendant CLARENCE DUKE MCGANN, for leave to appeal *in forma pauperis*, and in support of a motion by the United States of America for an order dismissing the defendant's appeal on the ground that it is completely without merit and frivolous on its face.

That the defendant was charged in a one count indictment filed on April 29, 1955, with a violation of Title 18, United States Code, Section 2111, in that on or about April 21, 1954, he and a co-defendant, CARL KILL SMITH, did take by force and violence, and by intimidation, the amount of approximately Five Thousand Four Hundred Fourteen Dollars ($5,414.00) in United States Currency, from the presence of one NORMAN RAPPAPORT at the Veterans Administration Hospital, Brooklyn, New York, within the Eastern District of New York, and the special territorial jurisdiction of the United States.

That on May 9, 1955, the defendant was arraigned before the Honorable Walter Bruchhausen who assigned Benjamin Glass, Esq. to represent to represent him and "after a conference with counsel" MCGANN entered a plea of not guilty. (Docket Entries)

[fol. 51] That on July 8, 1955, after the case had appeared on the calendar several times, the defendant still represented by counsel, who was present, withdrew his plea of not guilty and entered a plea of guilty to the indictment.

That on August 8, 1955, after his motion to withdraw his guilty plea was denied, the defendant was sentenced to a term of imprisonment for 12 years, to run concurrently with a sentence of 20 years imposed by the District of Maryland.

That on October 30, 1957, the defendant made a motion for reduction of sentence, which was denied after a hearing on November 4, 1957.

That on April 7, 1958, the defendant filed a motion to vacate and set aside the judgment of conviction against him, which was denied by the Honorable Walter Bruchhausen in a memorandum dated April 8, 1958.

That on April 17, 1958, the defendant made a motion for leave to appeal *in forma pauperis*, which was denied by Judge Bruchhausen on the same date, at which time he certified that the appeal was not taken in good faith.

That defendant moved for leave to appeal *in forma pauperis* from this order, in the United States Court of Appeals for the Second Circuit, which denied his motion in an order filed on August 21, 1958, and dismissed the appeal as being frivolous.

That on October 20, 1958, defendant made another motion to vacate his judgment of conviction which was denied by Judge Bruchhausen in a memorandum opinion dated November 18, 1958.

That according to the docket entries of the United States District Court for the Eastern District of New York, the United States Court of Appeals for the Second [fol. 52] Circuit denied a motion by the defendant to set aside judgment, dated November 10, 1958, and filed November 13, 1958; however, it is not clear to your deponent in just what manner and when defendant made such a motion in the Court of Appeals, and there is no indication of it in the District Court docket entries other than the entry of the receipt of a copy of the order of this Court.

That defendant's present motion is apparently made in connection with an appeal from the order of Judge Bruchhausen entered on November 18, 1958, denying his motion to set aside the judgment of conviction, and he urges as the primary ground for his appeal the denial of his motion to withdraw his plea of guilty, entered after he had received advice of counsel.

That on December 14, 1958, Judge Bruchhausen denied defendant's application for leave to appeal *in forma pauperis*.

That defendant urges that he was induced to plead guilty in the Eastern District of New York by promises of a suspended sentence made to him by your deponent and by George S. Leisure, Jr., Esq., formerly an Assistant United States Attorney for the Southern District of New York.

That your deponent categorically denies that she ever made any such promises to defendant and she has had a conversation with Mr. Leisure in which he indicated a willingness, if necessary, to submit an affidavit that he made no such promises.

That the question of promises allegedly made to defendant has been litigated and re-litigated in the United States District Court for Southern District of New York and the Court of Appeals for the Second Circuit.

[fol. 53] That as Judge Bruchhausen pointed out in his memorandum of November 18, 1958:

> "Assuming, without conceding, that either or both of the Assistants in the offices of the District Attorneys agreed with the defendant to plead for lighter sentences and did not do so, such omissions could not and did not infringe upon his legal rights or alter his status in that the Court, in fixing punishment, gave him full credit for the plea of guilty and the consequent avoidance of a trial. The added supplications of the defendant's adherents could add nothing toward a proper and just determination of the sentence. The Court, fully aware and cognizant of that consideration as well as all other factors remained the sole arbiter of the sentence and exercised its function, as prescribed by law. See also United States v. Earl Kill Smith, 2 Cir., 257 F.2d 432."

That from all of the above facts, it is clear that the only question raised by defendant has been before this Court on a number of previous occasions, has been decided adversely to him, and in any event, is without merit.

WHEREFORE, your deponent respectfully requests that the defendant's motion for leave to appeal *in forma pauperis* be in all respects denied and that his appeal be dismissed.

/s/ Marie L. McCann
MARIE L. McCANN
Assistant U. S. Attorney

Sworn to before me this 10th day of February, 1959.
ROBERT S. KREINDLER

Notary Public, State of New York, No. 24-2198700, Qualified in Kings County, Commission Expires March 30, 195

[fol. 54] • • • •

[fol. 54a] • • • •

[fol. 55] IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
NEW YORK, NEW YORK

Cr. No. 43953

CLARENCE DUKE MCGANN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPELLANT REPLY TO APPELLEE'S MOTION TO DISMISS
DATED 10 FEBRUARY 1959

The appellee has given partial facts in it's motion to dismiss. The appellant will try to show the full facts of these statements.

(1) That on July 8, 1955, when the Appellant withdrew his plea of Not Guilty and entered his plea of Guilty. This was done after the Appellant had been visited in the Tombs by the United States Attorney, Miss Marie McCann, and another United States Attorney whom Miss McCann identifys as Mr. Kenneth C. Sternberg. When this visit was made my court appointed attorney was not present. Nor was any agent of the F. B. I. present.

Further when the F. B. I. requested that the Appellant tell them about the crime and sign a confession he told them that he had made a deal with the United States Attorney's, that he had lived up to his part of the bargain by pleading guilty, now it was up to the government to keep it's end of the bargain. The records of the F. B. I. will show or should show that the Appellant made no statement or signed no statements.

That on April 7, 1958, the Appelants motion was denied without a hearing. The Appellant was not served with a copy of the decision of the lower court; as rendered on April 8, 1958 by Judge Bruchhausen.

That on April 17, 1958, the Appellants Motion to Appeal in Forma Pauperis was denied by Judge Bruchhausen, without the Appellant getting a copy of the decision. The appellant received one word which was *denied*.

That this court denied the Appellants motion to Appeal in Forma Pauperis on the basis of Earl Kill Smith vs. United States of America this court on 24 July 1958.

On the 28 of August 1958 the Appellant filed a motion for rehearing upon the grounds, that the appellant he was not aware of the decision of the Lower Court. That he did not know that the lower court never considered his point of contention "that the refusal of the Lower Court to allow the Appellant to withdraw a plea of guilty before imposition of sentence was and is a reversable error."

This court held in its decision of October 1958 "that the Petition for rehearing was denied without prejudice to another motion in the District Court upon a different and more complete statement of facts."

The Appellant following the decision of this court filed a second motion in the District Court putting in full all the facts which involve around his plea of guilty and request that the sentence be vacated upon the grounds that the original plea was made under duress and undue [fol. 56] influence and that the Courts refusal to allow the Appellant to withdraw his plea of guilty was and is a reversable error, as such denial was done without a hearing or finding of fact.

On November 18, 1958 Judge Bruchhausen again denied the appellants without a hearing and again without ruling on the point of law that the Appellant has been contending—Namely that the Court refusal to allow the Appellant to withdraw his plea of guilty without making a finding of fact before impositition of sentence is a reversable error.

That on December 14, 1958, Judge Bruchhausen denied the Appelant's application to Appeal in Forma Pauperis. The word denied was again the only order of the court. The Appellant has attached his copy of the order and has exhibited it as exhibit "A"; on his original motion for leave to Appeal in Forma Pauperis now pending in this court.

The Appellee has relied heavily on this Courts decision in the case of Smith vs United States No. 382 October term 1957, Docket No. 24923 2nd Circuit, Court of Appeals.

The facts of which the decision of the Smith case is based on cannot and do not resemble the present case. The Appellant did not wait two years to make his request. He made his request before impositition of sentence. Therefore everything that the Appellant states now must be taken as the same facts of which would have been brought out if the Appellant had been granted a hearing when he made his Motion to withdraw his plea of guilty and stand trial.

Nor can the Appellee contend that I relied soly on the promises made to me, for when I made my motion to withdraw my plea of guilty, I then and there showed that I no longer trust the word of the United States Attorney's. For I found out they where not to be trusted.

The last point of which the Appellee rely's on is the decision of Judge Bruchhausen. In which the Lower Court stated that it had taken into consideration my plea of guilty in rendering its sentence, this statement has no effect whatsoever on my constitutional right to trial by Jury.

No matter how much consideration he has given my plea of guilty which was induced and not based upon my own free will. For I am innocent of the crime alleged. He cannot place a price on my constitutional rights. It's my right to have a trial by Jury if I desire. It's also my right according to the present practice to have a hearing on a motion to withdraw a plea of guilty before impositition of sentence to determine the facts involved. This was not done. Wherefore the Appellant moves this court to allow him to Appeal to this Court for Writ of Certiorari directed to the District Court for the Eastern District of New York, in Forma Pauperis. Directing said lower court to vacate set aside the sentence imposed in Cr. No. 43953. See Bergen vs. U. S. 145 F. 2d 181) Townsend v. Burke, 334 U. S. 736, 738, 68 S. Ct. 1252, 1254, also. Dandridge v. United States No. 609 October Term 1957 United States Supreme Court.

Respectfully submitted,

/s/ Clarence Duke McGann
Clarence Duke McGann

[fol. 57] PROOF OF SERVICE
(Omitted in Printing)

[fol. 58] IN UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

* * * *

Present: Hon. Harold R. Medina,
Hon. Carroll C. Hincks,
Circuit Judges.

Hon. William C. Mathes,
District Judge.

United States of America, plaintiff-appellee

v.

Clarence Duke McGann, defendant-appellant

Order Denying Motion for Leave to Proceed in Forma Pauperis, etc.—March 5, 1959

A motion having been made herein by appellant pro se for leave to proceed in forma pauperis,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

Further ordered that the cross-motion to dismiss the appeal be and it hereby is granted, and that the appeal from the order of the United States District Court for the Eastern District of New York be and it hereby is dismissed.

A. Daniel Fusaro,
Clerk

* * * *

[fol. 58a] (File Endorsement Omitted)

[fol. 59] SUPREME COURT OF THE UNITED STATES

No. 731 Misc., October Term, 1958

CLARENCE DUKE MCGANN, PETITIONER

v.

UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the Second Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—June 29, 1959

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1039 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE 1959 533026 759